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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 207

DAVID CHARLES KLEIN, Trustee in Bankruptcy of WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Petitioner,

—against—

BRANDT & BRANDT PRINTERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, David Charles Klein, Trustee in Bankruptcy of William Friedman doing business under the name and style of Faultless Press, Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The Opinions Below

There are two opinions of the Court of Appeals for the Second Circuit in this proceeding. The first opinion (Appx., p. 11) is reported at 220 F. 2d 935 and it remanded the case for further proceedings. The second opinion (Appx., p. 18) in which the court adhered to its former decision, is reported at 232 F. 2d 151.

The opinions of the Referee in Bankruptcy (Appx., p. 1) and of the District Court (Appx., p. 10), which were reviewed on the first appeal, are not officially reported. The Referee and the District Court rendered no opinions in the proceedings which followed the remand directed by the first decision of the Court of Appeals.

The Grounds for Jurisdiction of This Court

The judgment of the Court of Appeals for the Second Circuit on the first appeal is dated February 14, 1955 and was entered the same day. A petition for rehearing was filed by the present petitioner who was appellee on the said appeal, and was denied by judgment of the court dated May 11, 1955 which, however, modified the court's opinion. The judgment remanded the case for further proceedings in accordance with the opinion.

The judgment of the Court of Appeals on the second appeal, following the remand, is dated April 20, 1956 and was entered the same day. No petition for rehearing was filed.

The jurisdiction of this court is invoked under §24c of the Bankruptcy Act, 11 U. S. C. §47c and under 28 U. S. C. §1254(1).

The Questions Presented for Review

1. Does §5i of the Bankruptcy Act require the bankruptcy court to surrender assets in its jurisdiction to the respondent, a secret partner of the bankrupt who has denied being a partner, made adverse claims as an alleged creditor to property in the custody of the court, and litigated the issue of partnership with the Trustee in bankruptcy?

2. Does the adjudication as a bankrupt of an individual, William Friedman, under the trade name of "Faultless Press" result in the adjudication of the secret partnership which conducted the business under that name and of which the individual was a general and the managing partner?

3. Does the bankruptcy court have the power to grant allowances to the Receiver, the Trustee and their attorneys from property and funds in its custody, which have been the subject of a successful proceeding by the Receiver and Trustee to declare void adverse claims to the property asserted by the respondent, a secret partner, before the assets are turned over to respondent for the purpose of settling the partnership business and paying creditors?

4. Does the Bankruptcy Act prohibit the bankruptcy court from applying the doctrine of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, so as to compensate the Receiver, Trustee and their attorneys

from the property in litigation which they have preserved for the benefit of the creditors as a class?

Statutes Which the Case Involves

Bankruptcy Act, §2a, Subd. (3) and (7),
11 U. S. C. A. §11(a)(3) and (7).

> Sec. 2a.—The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> (3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, * * *

Bankruptcy Act, §5i, 11 U. S. C. A. §23(i).

i. Where all the general partners are adjudged bankrupt, the partnership shall also be adjudged bankrupt. In the event of one or more but not all of the general partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt.

Bankruptcy Act, §23a, 11 U. S. C. A. §46(a).

Sec. 23a.—The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Bankruptcy Act, §64a, Subd. (1).
11 U. S. C. A. §104(a)(1).

Sec. 64a.—The debts to have priority, in advance of the payment of dividends to creditors,

and to be paid in full out of bankrupt estates, and the order of payment, shall be

(1) The actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * *

Statement of the Case

William Friedman operated a printing plant under the name of "Faultless Press" when an involuntary petition in bankruptcy was filed against him "doing business under the name and style of Faultless Press" in the United States District Court for the Southern District of New York on March 23, 1954. Friedman had disappeared prior to the proceeding and Faultless Press was ostensibly a sole proprietorship, Friedman having filed a certificate of doing business under that trade name. An order of the District Court dated March 24, 1954 appointed David Charles Klein as Receiver, and he took possession of the bankrupt's premises and the property located therein, consisting of printing machinery and equipment. Pursuant to successive orders of the District Court, the Receiver continued the business of the bankrupt from March 24 to April 30, 1954, completing printing work which was in process, and collected moneys due from customers of the firm. An adjudication as a bankrupt of Friedman in the trade name was entered on default.

The interests of creditors required that there be a sale of the physical property held by the Receiver. The landlord of the bankrupt's premises was the respondent Brandt & Brandt Printers, Inc. (herein referred to as "Brandt"), which occupied adjoining

premises and was a printing broker, soliciting orders for printing which it had performed by others.

Brandt made claim on the Receiver for certain of the printing presses and equipment which it allegedly had "leased" to the bankrupt under an agreement dated December 6, 1941 (Trustee's Ex. 4), this being designated as "Schedule A" property. The consideration payable to Brandt under this "lease" was one-half the net profits of Faultless Press. Brandt also held a chattel mortgage made by the bankrupt on other machinery and equipment designated as "Schedule B" property, to secure a "debt" of $21,063 (Trustee's Ex. 5). Brandt also purported to be the assignee of the bankrupt's accounts receivable, as security for indebtedness of the bankrupt, pursuant to a clause of the 1941 agreement. The Receiver conducted an examination of Brandt, under §21a of the Bankruptcy Act, for the purpose of inquiring into these claims which totalled approximately $41,000.

The Receiver filed a petition dated May 4, 1954 with the Referee in Bankruptcy for authority to sell the "Schedule A" and the "Schedule B" property free of Brandt's ownership claim as to the former and of its mortgage lien claim on the latter. The petition alleged that Brandt was a co-partner with the bankrupt in the business of Faultless Press and pleaded that its claims were void against creditors. An order to show cause was issued and, on its return, Brandt filed an answer dated May 10, 1954 which denied the allegation that it was a partner in Faultless Press, pleaded its title to the "Schedule A" property, pleaded the validity of its mortgage on the

"Schedule B" property, and prayed for affirmative relief directing that the Receiver deliver to it the "Schedule A" property.

A trial of the issues on the pleadings between the Trustee (who had succeeded himself as Receiver) and Brandt was held before the Referee. The evidence established Brandt's interest in the business and its control over its operations. The 1941 agreement provided that Friedman was to have charge of the management "subject to the supervision of Brandt." Checks were to be signed by Brandt. The agreement gave Brand one-half of the profits of Faultless Press from all sources, whether performed on the machinery furnished by Brandt or on other machinery. The first year that a loss occurred Brand deducted one-half the loss in its own income tax return. The accountant prepared separate statements of capital account for Friedman and Brandt, showing their interests in the business. Both drew money for alleged travel and entertainment expenses. Brandt signed checks for the purchase of machinery and negotiated a bank loan for Faultless Press. Brandt made frequent advances to meet the payroll of Faultless Press and other expenses. When Friedman entered a hospital, Brandt managed the business alone and had the bank balance of Faultless Press transferred to a special account which it controlled for several months up to the date of the bankruptcy.

An agreement of May 6, 1947 (Trustee's Ex. 10) declared the interests of Friedman and Brandt in the physical property of Faultless Press. The "Schedule A" property was described as the sole property of Brandt. The "Schedule B" property

(which had been purchased by Faultless Press between 1942 and 1947) was described as machinery in which Friedman and Brandt each had an undivided one-half interest. It was agreed that each would have a similar one-half interest in all machinery "heretofore or hereafter purchased or otherwise acquired by or in the name of Faultless Press." The chattel mortgage to Brandt purported to mortgage Friedman's one-half interest in the "Schedule B" property.

The Referee rendered a decision (Appx., p. 1) in which he found that the bankrupt and Brandt "were engaged as copartners in conducting the business of Faultless Press." The Referee's order dated July 15, 1954 (Appx., p. 10) which recites this finding, adjudged that:

(a) the chattel mortgage held by Brandt was void against the Trustee;

(b) Brandt's claim as a creditor was subordinate to the claims of other creditors;

(c) "All property and the proceeds of property which came into the possession of the Receiver or Trustee is subject to disposition in this proceeding."

The Referee's order was confirmed by the District Court (Appx., p. 12) and Brandt appealed to the Court of Appeals for the Second Circuit, arguing on appeal that

(a) the finding that it was a partner of the bankrupt was erroneous;

(b) it was the owner and entitled to the possession of the "Schedule A" property and its chattel mortgage on the "Schedule B" property was valid;

(c) if it was a partner, it was entitled to possession of the partnership assets for the purpose of settling the partnership business.

The Court of Appeals affirmed except for the ruling that the property of Faultless Press held by the Trustee was subject to administration in the bankruptcy. It held that §5i of the Bankruptcy Act required that all partnership assets, as distinguished from individual assets of Friedman, be turned over to Brandt, as the non-bankrupt partner, "which must then settle the partnership business expeditiously" and pay partnership liabilities. The case was remanded for further proceedings consistent with the opinion. (Appx., p. 13)

On remand, the opinion of the Court of Appeals required that (a) the partnership assets be segregated from individual assets; and (b) all claims of creditors should be classified as partnership (Faultless Press) claims or individual claims, and the former should be subordinated. The "Schedule A" and "Schedule B" property had, pending the litigation, been sold at a Receiver's sale and a Trustee's sale and converted to cash. The Trustee's segregation showed that he held $40,002.50 as partnership assets and $285.57 as individual assets. The fund of $40,002.50 included more than the proceeds of the "Schedule A" and the "Schedule B" property, which was the *res* involved in this controversy to declare void the Brandt claims on that property. The fund also included $17,370.90 collected by the Receiver and Trustee from debtors of the business and the proceeds of the Receiver's sale of certain property on which Brandt had made no claims and which was stipulated to be sold free

and clear, described as "paper, ink, printer's supplies and office furniture." The decision of the Court of Appeals, accordingly, was extended to funds and property which were not the subject of this proceeding or referred to in the pleadings in any way. Classification of creditors' claims (reduced by objections taken by the Trustee from $70,568. to $59,732.) showed that the claims filed by Faultless Press (or partnership) creditors, which include the petitioning creditors in bankruptcy, totalled approximately $50,000.

After the Court of Appeals decision, Brandt petitioned the Referee in Bankruptcy for an order directing the Trustee to turn over to it the fund of $40,002.50. The Trustee filed an answer and a cross-petition alleging that the services of the Receiver, the Trustee and their attorneys had served the interests of creditors, had been successful in preserving property against the adverse claims of Brandt as owner and mortgagee and that the creditors' equitable right to the property had been established by the finding of partnership which would require Brandt to distribute the fund to creditors in the liquidation of the partnership business. The Trustee prayed that the compensation of the court's officers and their attorneys be fixed and paid from the fund before it was turned over to Brandt.

The Referee granted the Brandt petition and denied the Trustee's petition. The District Court reversed the Referee and remanded the case to have the expenses and compensation of the Receiver, Trustee and their attorneys fixed and paid from the $40,002.50 fund before it was turned over. Brandt appealed

to the Court of Appeals. On the appeal, it was argued by the Trustee-Appellee that the allowance was justified both under principles of bankruptcy law and as a matter of equity in view of the benefit resulting to creditors from the services of the court's officers and the judgment in this controversy. It was also argued that the Court should reconsider and set aside its prior decision that the partnership assets were not to be administered in the bankruptcy. The Court of Appeals adhered to its former decision and ruled further that the fund did not constitute part of the bankrupt's estate and could not be charged with compensation of the court's officers and their attorneys. It reversed the District Court. (Appx., p. 20)

It is sought to review in this court the two decisions of the Court of Appeals which, in the second appeal after remand, could reconsider its prior decision (*Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878 [2d Cir., 1919]; *Lebold* v. *Inland Steel Co.*, 136 F. 2d 876, 877 [7th Cir., 1943], cert. den. 320 U. S. 787) and did adhere to it. See also, as to the scope of review in this court where there has been a remand by the Court of Appeals and a second decision in the proceedings after remand, *Smith* v. *McCullough*, 270 U. S. 456, 461; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251.

The basis for federal jurisdiction in the first instance in this proceeding is §2a(7) and §23a of the Bankruptcy Act (11 U. S. C. A., §§11(a)(7) and 46(a)). The power of the bankruptcy court to determine rights and claims to property within its custody is clear. *Williams* v. *Austrian*, 331 U. S. 642, 652.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

I. The construction of §5i of the Bankruptcy Act by the Second Circuit in this case is without precedent and (a) conflicts with a decision of the Ninth Circuit; (b) ignores principles of equity which apply in bankruptcy; (c) creates serious impediments to bankruptcy administration.

The decision of the Second Circuit in this case that one claiming to be a creditor of the bankrupt estate may, after its claims have been voided because it has been found to be a partner of the bankrupt, nevertheless demand the right to administer partnership assets under §5i of the Bankruptcy Act and remove them from the jurisdiction of the bankruptcy court conflicts with the decision of the Ninth Circuit in *Kaufman-Brown Potato Co.* v. *Long,* 182 F. 2d 594, 603 (9th Cir., 1950). On this point the Ninth Circuit followed *In re Harris,* 108 F. 517 (D. C. N. D., Ohio, 1899), an opinion by Referee Remington, author of the treatise on bankruptcy. The holding of the latter cases is supported by the better reason and equity. It does not appear that §5i applies either (a) to a secret partner or (b) to one who has denied partnership status and liability and asserted creditor claims against the bankrupt estate.

Section 5i is intended for the situation where administration in bankruptcy is unnecessary because creditors may enforce payment against an overt partner. In such case, creditors do not need the sequestration remedy of bankruptcy against the firm assets. In the case of a secret partner, however, this consideration does not apply. There is no certain

remedy against one who claims to be a creditor and denies the liability of a partner to creditors. Such a claimant takes an adverse position to the creditors. He cannot thereafter, in equity, receive property subject to the duty of a liquidating partner to distribute it among creditors. Administration in bankruptcy can only be impeded by permitting an alternative position to be taken, i. e., a denial of partnership with an inconsistent claim to administer assets of the repudiated partnership. Section 5i enjoins that the partnership business be settled "as expeditiously as its nature will permit." There can be no expedition where the secret partner denies his status, does not promptly demand the partnership assets from the bankruptcy court and litigates the issue of partnership in the bankruptcy court. In the meanwhile, the bankruptcy must proceed. Property must be conserved and debts collected. Claims must be filed within six months after the first meeting of creditors (§57a), the trustee must examine claims and object to those which are improper (§47a[8]) and physical property must be liquidated and reduced to money (§47a[1]).

Brandt permitted partnership assets to be taken into the control of the bankruptcy court. It voluntarily turned over to the Receiver the balance in the firm's bank account of $1768. This was a consent to administration of a partnership fund. It matters not, as stated by the Court of Appeals, that this occurred before the Trustee sought to hold Brandt as a partner. The Trustee did not create the partnership; it had existed by agreement of the parties. Brandt did not seek to reclaim even the "Schedule B" property in which, by contract, its one-half interest had been declared. It disclaimed a partner's interest in the

firm assets. It cannot thereafter claim a right to remove them from the court's jurisdiction. It has, under principles of equity applicable to bankruptcy, given its "consent" to their administration in bankruptcy within the meaning of that term as used in §5i.

Kaufman-Brown Potato Co. v. *Long, supra,* where the partner claimed to be a creditor, is sought to be distinguished by the Court in the instant case with the statement that "apparently the objecting partners had not objected to the bankruptcy court's administration of the partnership assets until after they had been sold." It does not appear in that case, however, when the objection was taken. In any case, the fact of a sale is not the critical fact. The jurisdiction of the bankruptcy court attaches when it takes possession of the assets through its officer. It then commences administration of those assets and, whether or not a sale follows, administration proceeds. In the instant case, the assets were used for five weeks in the continuation of the business by the Receiver and debts due the firm were collected without any intervention by Brandt. The court held that Brandt's answer to the Receiver's petition should, under the rule of "liberal construction of pleadings," be construed as an alternative plea: denying it was a partner, but if it was a partner, asking that the Trustee surrender possession of the partnership assets so that it might settle the partnership business. The only affirmative relief claimed in the answer is that the Receiver surrender the "leased" "Schedule A" property, only part of the partnership assets, and this plea was based upon the alleged sole ownership by Brandt of this property. Assuming there was an alternative plea, there is an important

question as to whether the Bankruptcy Act and the principles of equity permit such an inconsistent position. In *Francis* v. *McNeal,* 228 U. S. 695, 701 (1913) this court stated that Section 5i (then Section 5h) did not apply to a partner who "never has objected to the firm property being administered by the Trustee" of the bankrupt partnership. In *United States National Bank* v. *Chase National Bank,* 331 U. S. 28 (1947), this court held that, in determining whether a creditor had waived rights in the bankruptcy, the bankruptcy court must "look to the equities involved as well as the intentions of the parties".

The Court of Appeals gave the finding of partnership, which is a recital in the Referee's order, the effect of a judgment. It was, however, only a finding of fact which sustained the disallowance and subordination of Brandt's claims under the doctrine of *Pepper* v. *Litton,* 308 U. S. 295 (1939), cited by the Referee's decision. That authority establishes that where a creditor has participated in or supervised the affairs of the bankrupt, equity will not permit him to share equally with other creditors. *Pepper* v. *Litton* was sufficient authority for the voiding of Brandt's claims whether or not it was found to be a partner, although that finding gave further support to the judgment.

II. The question of whether the adjudication of bankruptcy, by inclusion of the trade name, adjudicated the secret partnership doing business in that name is an important question of bankruptcy law.

The petition and adjudication in bankruptcy were against William Friedman "doing business under the name and style of Faultless Press." In this pro-

ceeding by the Trustee it was determined that Faultless Press was actually a partnership of Friedman and Brandt. It was argued in the Court of Appeals that the adjudication of bankruptcy extended to the secret partnership that conducted business under the trade name of Faultless Press and that the secret partner could not be heard to argue otherwise, authority for this proposition being *In re Harris*, 108 Fed. 517 (D. C. N. D., Ohio, 1899). The Court of Appeals considered *In re Harris* wrong.

The question of the extent of an adjudication in bankruptcy where there is a dormant or secret partner is an important question of federal law which has not been, but which should be, settled by this court. A partner, though not a bankrupt, may be compelled to surrender his individual estate to the trustee in bankruptcy of the adjudicated partnership. *Francis* v. *McNeal*, 228 U. S. 695 (1913); *Liberty National Bank* v. *Bear*, 276 U. S. 215, 225 (1928). Despite this holding proceedings by the trustee in bankruptcy to extend the proceeding to, or reach the assets of, a secret partner have been unsuccessful. Cf. *In re Fuller*, 9 F. 2d 557 (2d Cir., 1925), cert. den. 269 U. S. 568; *In re Samuels*, 215 Fed. 845 (2d Cir., 1914); *In re Kaufman*, 176 Fed. 93 (2d Cir., 1910); *Carter* v. *Whisler*, 275 Fed. 743 (8th Cir., 1921).

Jurisdiction over a partnership alleged to be bankrupt is obtained by serving process on the general partner (Bankruptcy Act, §18a; 11 U. S. C. A., §41a; Federal Rules of Civil Procedure, Rule 4(d)(3)). Where the trade name is stated in the petition, a secret partner is on notice that what the creditors are seeking is a sequestration of the assets of the business entity rather than the individual's assets alone. Com-

pare *Liberty National Bank* v. *Bear, supra.* If the secret partner, with knowledge of the proceeding, then fails to defend the proceeding or to controvert the acts of bankruptcy alleged to have been committed by the entity, it should not be heard to argue later that the adjudication does not include the entity whose assets the petitioning creditors were seeking to sequester for equitable distribution as the bankrupt estate. In *In re Harris, supra,* the bankruptcy proceeding was against Mattie E. Harris. It was then determined that her husband, F. J. Harris, was a secret partner in the business conducted under the name of Mattie E. Harris. The bankrupt's motion that the assets be administered for the benefit of her individual creditors rather than the partnership creditors was denied by Referee Remington, who stated (108 Fed. at p. 519):

> "But there is another view of this proceeding that might also be reasonably taken, and that is that this bankruptcy is in reality an adjudication of bankruptcy of an ostensible partnership, and that, such being the case, the partnership in reality was thereby adjudicated bankrupt under the name of Mattie E. Harris; such appearing to be the firm name under which the secret partnership did business. * * * The adjudication that a firm is bankrupt cannot be made null and void and inoperative through the mere failure of creditors to join a secret partner, whose name was perhaps being purposely withheld by the ostensible partner. * * *"

III. The question of whether the bankruptcy court has the power to grant allowances to its officers from property in its custody and which is the *res* in a controversy litigated in the bankruptcy court is an important question of federal law.

The decision of the Court of Appeals that allowances to the Receiver, the Trustee and their attorneys may only be made from the fund which is to be distributed to creditors in the proceeding conflicts with the decision of the Seventh Circuit in *In re Peer Manor Bldg. Corp.*, 143 F. 2d 764, 767 (7th Cir., 1944), cert. den. 323 U. S. 757 and *In re T. E. Hill Co.*, 159 Fed. 73 (7th Cir., 1907). In the *Peer Manor* case, after a proceeding under Chapter X of the Bankruptcy Act was dismissed, the bankruptcy court was held to be authorized to make allowances to the Trustee and the Trustee's attorney payable from the property of the alleged debtor in the possession of the Trustee. On this point the decision of the Seventh Circuit accords with that of this court in *Warren* v. *Palmer*, 310 U. S. 132 (1940), a proceeding under §77 of the Bankruptcy Act. After a decision that the District Court lacked jurisdiction over the alleged debtor, this court sustained the power of the bankruptcy court to charge the property which had been erroneously administered with the expenses of the trusteeship, stating that "courts having custody of property or a fund have the power 'to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it.' Such a power reposes in any court charged with custody of property" (310 U. S., at p. 139).

The Court of Appeals in the instant case held that allowances to the court's officers and their attorneys can only be made "out of bankrupt estates" and that the fund to be turned over to Brandt was not part of the estate. There is no definition of the bankrupt estate in the Bankruptcy Act. The bankruptcy court has proper jurisdiction over all property which is in the custody of the bankrupt. This property must be held by the Receiver and cannot be turned over to any claimant without an order of the court. *Whitney* v. *Wenman*, 198 U. S. 539; *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 570. All controversies as to such property, involving either title or liens, must be determined in the bankruptcy court. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Harris* v. *Avery Brundage Co.*, 305 U. S. 160. This court has indicated that all property in the custody of the bankrupt is part of the "estate" in *Hebert* v. *Crawford*, 228 U. S. 204, 205. It said there, as to a rice crop claimed by a third party:

> "If the rice was then in their [bankrupts'] possession, the Bankruptcy Court had jurisdiction to administer it as assets of the estate, and to determine all claims to the property. *Babbitt* v. *Dutcher*, 216 U. S. 102. *Bryan* v. *Bernheimer*, 181 U. S. 188. *Bardes* v. *Hawarden Bank*, 178 U. S. 524."

It is a principle of equity, which applies in bankruptcy, that the power to adjudicate rights in a *res* includes the ancillary power to make allowances from the *res* to the court's officers for administering the property pending the litigation. Such an allowance for "services or property furnished upon the authority of the court . . . for the common benefit

of those interested in a fund administered by the court" has been referred to as "an expense of justice." *New York Dock Co.* v. *S. S. Poznan,* 274 U. S. 117, 121. Even where the suit has been dismissed for lack of jurisdiction and the appointment of the receiver is held to have been erroneous, an allowance to the receiver and his attorney has been sustained as a charge on the property in custody. *Burnrite Coal Briquette Co.* v. *Riggs,* 274 U. S. 208; *Palmer* v. *Texas,* 212 U. S. 118, 132. As authority for its decision in the *Burnrite* case, this court cited *In re T. E. Hill Co.,* 159 Fed. 73 (7th Cir., 1907), where an allowance to the receiver in bankruptcy from the funds in court was sustained although the proceeding was dismissed and there was no adjudication of bankruptcy. In the absence of a bankrupt, there is, of course, no bankrupt's estate. Prior to adjudication, the person named is a "defendant" (Bankruptcy Act, §18a).

The holding of the Court of Appeals in the instant case that there must be a bankrupt estate for allowances to be made is, therefore, not in accord with the cited decisions. In *Warren* v. *Palmer, supra,* a §77 proceeding, allowances were authorized alth .gh the proceeding was dismissed and there was no "debtor's estate." Section 77(c)(12), providing for payment of allowances "out of the debtor's estate" has language comparable to that of §64, which provides for allowances "out of bankrupt estates." Thus, both Section 77, governing railroad reorganizations, and Chapter X, applying to corporate reorganization generally, have, on the subject of allowances, been construed contrary to the construction of Section 64 by the Court in the case at bar.

Section 2a(3) imposes the duty upon a receiver "to protect the interests of creditors". That duty was performed here by both the Receiver and Trustee. The Court of Appeals has denied the court's power to compensate these statutory services from the fund in court. The administration of the assets in the instant case was made necessary by Brandt's denial of the partnership. While Brandt was asserting adverse claims, the Receiver and Trustee would have breached their duty to creditors if they had delivered any property to Brandt. Brandt would presumably have applied the property to satisfy its own claims. Administration was at least necessary up to the point where Brandt exhausted its appeals and first demanded property in the capacity of a partner. This court, in *Burnrite Coal Briquette Co.* v. *Riggs, supra*, referred to the doctrine that a party who has led the court into an erroneous exercise of jurisdiction, by placing a challenge on untenable grounds, may not complain if he is thereafter saddled with the charges of the proceeding. In that case the Third Circuit had placed its decision on that doctrine (6 F. 2d 226 [3rd Cir.]) and this court affirmed on other grounds.

IV. The question of whether receivers and trustees in bankruptcy may be compensated from a fund created or preserved against adverse claims for the benefit of creditors, although such fund does not become part of the bankrupt estate, is an important question of federal law.

The Court of Appeals held that the equity powers which may be exercised by a bankruptcy court did not include the making of allowances to the Receiver and Trustee and their attorneys from funds recovered for

the benefit of creditors which were not part of the "bankrupt's estate". It rejected the argument that the doctrine of *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939) and *Trustees* v. *Greenough*, 105 U. S. 527 (1881) applied to this litigation. The decisions of this court have held the equity powers of the bankruptcy court applicable to "a wide range of problems arising out of the administration of bankrupt estates," (*Pepper* v. *Litton, supra*) and state that all equity powers may be exercised by the bankruptcy court "unless prohibited by the Bankruptcy Act" (*Young* v. *Higbee Co.*, 324 U. S. 204, 214 [1945]). The instant case appears to be the first to limit such equity powers.

The Receiver, Trustee and his attorneys accomplished a benefit for the creditors of the bankrupt by preserving the property (now represented by the fund) against the adverse claims of Brandt, who sought to take the property in satisfaction of its own claims. Equity would compensate these services and reimburse the court officers for their expenses. Whether this application of equity is prohibited by the Bankruptcy Act, as the Court of Appeals has here held, is an important question of federal law which has not been, but should be, settled by this court.

The authority cited by the Court of Appeals for its decision is *Guerin* v. *Weil, Gotshal & Manges*, 205 F. 2d 302 (2d Cir., 1953) which, in turn, cited *Lane* v. *Haytian Corp.*, 117 F. 2d 216 (2d Cir., 1941), cert. den. 313 U. S. 580 and *Berry* v. *Root*, 148 F. 2d 945 (5th Cir., 1945), cert. den. 326 U. S. 755. In these three cases it was held that the persons rendering the services were not persons enumerated in the Bank-

ruptcy Act as being entitled to compensation for the character of services rendered. Receivers, trustees and their attorneys are, however, entitled to compensation. The issue of whether the fund in court is chargeable with such compensation is a different question and is an important question of federal law involving the interpretation of provisions of the Bankruptcy Act in the light of the equity jurisdiction of a bankruptcy court. Cf. *Callaghan* v. *Reconstruction Finance Corporation*, 297 U. S. 464, 468 (1936). See also Section 64a(1) of the Act, which recognizes the equity doctrine by granting priority to expenses of creditors who have recovered property for the benefit of the estate. Reading the word "estate" as "creditors", the same result has been achieved by the Trustee here. The Act further provides that receivers and trustees are entitled to commissions on "moneys disbursed or turned over by them to any persons, including lien-holders" (§48a and §48c[1]). There is authority for charging mortgaged property, which is not part of the bankrupt's estate, with compensation of the court's officers. *In re Cramond*, 145 Fed. 966 (D. C., N. D. N. Y.); *In re Howard*, 207 Fed. 402, 417-418 (D. C., N. D. N. Y.).

This proceeding against Brandt is not a "proceeding in bankruptcy" but rather a "controversy arising in a proceeding in bankruptcy," the two classes of cases being distinguished by §§23a and 24a of the Bankruptcy Act. Controversies in bankruptcy are ordinary suits between the trustee and adverse claimants of property. *Childs* v. *Ultramares Corp.*, 40 F. 2d 474, 478 (2d Cir.). It is an independent litigation in equity or at law. The proceedings may be either plenary or

summary. Cf. *Williams* v. *Austrian*, 331 U. S. 642. A Referee in Bankruptcy is "a court of bankruptcy" (Bankruptcy Act, §1[9]) and has jurisdiction to try issues which would arise in a plenary action or suit. *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263. This proceeding against Brandt sought to determine rights in specific property and proceeded as a suit in equity. The trustee acted in a representative capacity and has accomplished a benefit for the creditors of the bankrupt. Whether they receive a dividend from the bankruptcy court or receive payment from Brandt in settlement of the partnership business, the result has been to preserve the assets of Faultless Press for the satisfaction of their claims against the adverse claims to those assets made by Brandt. Equity requires that the creditors should bear the expense of accomplishing this result. The Bankruptcy Act is not contravened by permitting an allowance from the fund. Assuming, *arguendo*, it is not part of the bankrupt estate, it would not be an allowance "in bankruptcy" for administration services and would need no authority in the provisions of the Act. It would be an allowance ancillary to a representative suit in equity.

Conclusion

WHEREFORE, the petitioner respectfully prays that a writ of certiorari be issued out of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that court to certify to this court a transcript of the record and pro-

ceedings of the case entitled on its docket, "*Brandt & Brandt Printers, Inc.* v. *David Charles Klein, Trustee,*" Docket Nos. 23386 and 23911.

JOSEPH CALDERON,
Counsel for Petitioner,
14 Wall Street,
New York, New York.

BERGERMAN & HOURWICH,
Of Counsel.

Dated: New York, N. Y.
June 26, 1956.

Referee's Opinion and Decision

The Referee: Let it appear that on May 4th, 1954, based upon the petition of the then receiver, now trustee, I signed an order to show cause directed to Brandt & Brandt Printers, Inc., and Parsons & Whittemore, Inc., to show cause why an order should not be granted authorizing and directing the receiver to have all the property of the bankrupt, consisting of printing machinery, equipment, supplies and materials, located at 132 White Street, Borough of Manhattan, City of New York, sold free and clear of all liens upon such property.

Let it appear that a hearing was held in relation to this order to show cause on the 17th of May, 1954, and it was agreed, among other things, that Parsons & Whittemore, who had sold property to this bankrupt under conditional sales agreement, that the property was to be sold at the auction sale to be conducted by the receiver, and Parsons & Whittemore were given an option to either have paid to them the amount realized upon the sale or else they were to be permitted to take back the property which consisted of 3 printing machines. As a result of what occurred at the auction sale, it being unnecessary to clutter up this record with the details of what occurred at the sale, except that Parsons & Whittemore are no longer parties to this proceeding, so that it is now a proceeding directed against Brandt & Brandt Printers, Inc.

Let it appear that from now on I shall refer to Brandt & Brandt Printers, Inc., as "Brandt", and that I shall refer to the bankrupt as "Friedman".

The trustee is seeking to have me make a finding that Brandt was a partner of the bankrupt, and that

because of the fact that they are a partner that they may not prove a claim as a creditor, and that the chattel mortgage held by Brandt is void as against the trustee, and that the estate of the bankrupt, as represented by the trustee, has a joint interest with Brandt in certain property which came into the possession of the receiver-trustee.

I have had before me the various witnesses who have been called by the parties. The hearing was necessarily postponed because of the absence of Jacob J. Brandt from the country, and did not commence until June 30th, and proceeded all that day and continued on July 1st, also July 8th, and the hearing was just concluded, on July 9th.

Brandt was engaged, I find from the overwhelming preponderance of the evidence, both oral and documentary, produced, in two distinct businesses. They were engaged in soliciting orders for printing which occupation was known as "printing brokers". In addition, they owned printing machinery.

Before the agreement in controversy, Trustee's Exhibit 4, made between them and Friedman doing business as Faultless Press and dated December 6, 1941, they had entered into similar contracts with one Max Friedman and Joseph Spenilli.

The agreement of December 6, 1941 is an agreement, by which Friedman was to hire from Brandt, the use of certain machinery, plant and equipment in connection with the business to be conducted under the trade name of Faultless Press by Friedman as a trade-name. The agreement was to continue for a term of five years, and for the rental of such machinery, Brandt was to receive 50 percent of the profits.

The agreement, however, goes much further, and in various paragraphs it gave Brandt, then a partnership, subsequently succeeded by the corporation, certain rights. Included in these rights was the right to sign checks, and the testimony discloses that a very large majority of these checks were signed by Brandt alone.

Significantly, in various paragraphs of the agreement, Trustee's Exhibit 4, it is set forth that this agreement is a venture agreement, and an examination of Trustee's Exhibit 11, which is dated the 20th of June, 1947, also recites the fact that this is to be considered a relationship of venture.

Let it also appear from the testimony at every stage of this proceeding, at all of the times when Brandt and Friedman got together and had conferences, and these agreements were drawn, that Brandt was advised by able counsel, Herbsman, and that these various agreements were drawn by Herbsman.

Now, it is a fact that in the normal case the burden is upon the moving party to proceed to sustain the issues and the burden of proof is upon the moving party, but because of the New York State Partnership Law, Section 11 thereof, subdivision 4, which reads as follows:

"Sec. 11. Rules for determining the existence of a partnership.

In determining whether a partnership exists, these rules shall apply.

* * * * *

"4. The receipt by a person of a share of the profits of a business is prima facie evidence that he

is a partner in the business, but no such inference shall be drawn if such profits were received in payment;

"(a) As a debt by installments or otherwise,

"(b) As wages of an employee or rent to a landlord."

I find, as a matter of law, in view of the fact that the agreement, Exhibit 4, calls for a division of the profits, that the usual burden cast on the trustee as the moving party, the baton of that burden passes over to the respondent, in this case, Brandt, because it is provided in Trustee's Exhibit 4, that the compensation to be paid for the rent of this machinery, is to be an equal division of the profits.

Now, then, has Brandt sustained this burden which has been passed to him? No. Just to the contrary. There are a number of very significant facts. I am just picking out a few of the highlights. The fact that almost all checks were signed by the Brandts; they exercised complete supervision over the business. This is borne out by various facts. When Friedman wanted to buy machinery he had to apply to Brandt for his consent; all of the conditional sales contract notes were signed by Brandt, and all other contracts were signed by Brandt. True they were signed by Brandt as attorney, but there is no proof adduced before me that Brandt had any authority as attorney to sign any documents for Friedman, except to sign checks and notes on the Merchants Bank. That was clearly evident from an examination of the exhibit produced from the files of the Merchants Bank, Trustee's Exhibit 3.

Referee's Opinion and Decision

The testimony discloses that Friedman requested permission of Brandt for the right to buy the Poly Presses and the Kelly Press. Brandt signed as attorney the contract for the purchase of these machines. In addition, Brandt caused to be hired by Friedman two of his brothers as employees of Friedman.

There came a time when Friedman desired to draw certain monies from the business as travel and entertainment expenses, and Brandt was consulted and agreed, and Brandt was to receive as travel and entertainment expenses a slightly smaller amount than that received by Friedman, which was divided between the two Brandts, although there is no testimony that Brandt ever had travelling or entertainment expenses for the account of Friedman.

Then there was testimony in relation to an investment made by Friedman in the preferred stock of Advertisers Services, Inc. The testimony discloses that there was $3,000 which was paid to Advertisers Services, Inc. by charging one-half of any amount ordered by Advertisers Services, Inc. in printing from Friedman. Subsequently, Friedman needed money, and Advertisers Services, Inc. agreed to buy back the stock, and did buy it back for $3,000, and it is a very significant fact that at that time one-half of the $3,000 was paid to Brandt.

While there is some testimony on the part of Brandt that that was charged against the profits, I can make no such finding from the testimony adduced before me upon that subject.

A very significant thing is that there came a year in which Friedman's business showed a loss. There is absolutely nothing in any of the contracts, Exhibit 4, or the changes thereinafter made in three subsequent

contracts, which are also exhibits, which refer to the right of Brandt to charge off any losses.

However, the first year of loss, of $12,000, the testimony discloses, Brandt did sign, acknowledge, and swear to an income tax return, and did take half of the loss of Friedman, to wit: $6,000, in an attempt to offset it against profits made by Brandt & Brandt Printers, Inc. in other businesses conducted by it.

It is true that Brandt maintains that the accountant suggested that they do it that way, but it was the responsibility of Brandt, and Brandt did sign and swear to or acknowledge the income tax return for that year. The fact that it was disallowed thereafter by the Internal Revenue Department is of no significance, but the fact that Brandt attempted to take this loss is one of the elements that cause me to find that Brandt's course of conduct constitutes Brandt a partner in Friedman's enterprise.

Another significant point in the testimony before me is the fact that when Friedman desired to make a loan from the Bank, that Brandt went to the Bank with him. That at the suggestion of the Bank, Brandt agreed to subordinate the amount due from Friedman to Brandt in the sum of $21,957.37 to the loan to be made of $7,500 of the Bank.

Now, another significant factor is Exhibit 41 and Exhibit 42, which were prepared by the accountant for Brandt, who at the same time was the accountant for Friedman, and which was labelled "Brandt Capital Account" and "Friedman Capital Account".

Examining the Brandt Capital Account I find a significant note of subrogation of this $21,957.37. This came about when Friedman went to the Bank to secure a loan and the Bank refused to make the loan unless

Brandt would endorse the note of $7500 or guarantee its payment. The Bank finally made the loan when Brandt agreed to subrogate the amount allegedly due it from Friedman for one-half of accrued profits, and the monies advanced for payroll, which it contended then amounted to the sum of $21,957.37.

All during the life of these contracts Brandt did make advances to meet the payroll. He had an option to do so, as set forth in Exhibit 4. When I say "he", of course I am talking about the partnership which afterwards became the corporation, and the findings apply to both.

Another significant factor is the fact that it has been testified that Friedman had no credit with the landlord of premises occupied by him. First the sixth floor of the premises, and then the seventh and eighth floors were leases taken in the name of Brandt, because landlord refused to enter into a lease with Friedman.

There is no evidence which would lead me to make a finding that there was any sublease in writing actually made to Friedman, but it is a fact that Friedman did occupy first a portion of the sixth floor, and then the entire seventh and eighth floors, and did pay rent to Brandt, who in turn paid it to the landord.

A significant feature is the evidence adduced in relation to life insurance. A life insurance policy taken out by Friedman on the life of Brandt, signed by Brandt on both Schedules A and B, on the photostat copy attached to the life insurance policy, is in evidence, the policy taken out on July 17th, 1946. There is testimony to the effect that the premium was paid by Faultless, but a very important factor is

that the policy discloses that it is signed by both Friedman and Jacob J. Brandt, and it reads Jacob J. Brandt was an employee of Faultless (Friedman).

Thereafter by a document signed by both Brandts and Friedman, all rights in this policy were assigned to Friedman.

The testimony further discloses that Friedman became ill and was in the hospital for six weeks or two months, and that while Friedman was in the hospital 47 hundred dollars was withdrawn by Brandt from the Friedman account, being amounts not previously drawn, as agreed, between the parties, for travelling and entertainment expenses, and while it is a fact it was loaned back by Brandt to Faultless Press, still it was taken out of the business and put on ths books as a loan, not as a drawing, and Friedman did not receive 47 hundred dollars due him on the same account, or any portion thereof to counteract that drawing.

In relation to the question of the boat expenses drawn by Friedman for the boat owned by him, it was agreed between Brandt and Friedman that of the amount drawn by Friedman for expenses of operating that boat, 25 percent of any such amount was to be drawn from the business of Friedman by the Brandts.

There is testimony to the effect that Friedman introduced Brandt as his partner to people whom he contemplated doing business with, and Brandt did not contradict or reply to these assertions of Friedman.

Summing up the conduct of Brandt during the years from 1941 to 1954, I find that Brandt participated actively in the business of Friedman.

From all of the facts adduced, I find that by course

of conduct Brandt was a partner of the bankrupt; that Brandt may not prove a claim as a creditor because of the equitable principles enunciated in the case of *Pepper* v. *Litton,* 308 U. S. 295, and the cases following this decision.

That Brandt's claim for profits and for advances made to Friedman must be subrogated to the rights of other creditors.

That the chattel mortgage held by Brandt, executed some two years ago, is void as against creditors, even though there was a present consideration of the sum of $5,000 advanced by Brandt to the partnership at the time of the execution of the mortgage.

I also find that the estate of the bankrupt has a joint interest with Brandt in all property which came into the possession of the receiver.

(Discussion off the record.)

The Referee: Do both parties agree that my decision shall constitute the Findings of Fact and Conclusions of Law, or do you want to present to me Findings of Fact and Conclusions of Law, based upon my decision.

(Discussion off the record.)

The Referee: Let it appear that I have consulted with counsel for both sides, and in view of the fact that I have made specific findings of fact, and based conclusions of law thereon, both sides are willing that my Findings of Fact and Conclusions of Law set forth in above decision, shall be the Findings of Fact and Conclusions of Law in this matter. Of course, not taking away from Brandt the right to appeal and to contest my Findings of Fact and Conclusions of Law upon such appeal.

(At 5 P. M. the hearing was marked closed.)

Order of Referee After Trial, Dated July 15, 1954

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 90132

At New York, New York, in said District, on the 15th day of July, 1954.

DAVID CHARLES KLEIN, Receiver, having filed a petition for an order authorizing the sale of property in possession of the said Receiver free and clear of all claims and liens of Brandt & Brandt Printers, Inc. and Parsons & Whittemore, Inc. and an order dated May 24, 1954 having been made by the Honorable Irwin Kurtz, Referee in Bankruptcy providing for the sale of certain of the said property and reserving jurisdiction to determine the title and right to possession of other property, and a proceeding having come on to be tried before the said Referee between David Charles Klein, Trustee, as successor to the Receiver-petitioner, and Brandt & Brandt Printers, Inc., respondent, and Bergerman & Hourwich (Joseph Calderon, Esq. of counsel) having appeared for petitioner and Gronich, Herbsman & Aleyner (Samuel Herbsman, Esq. of counsel) having appeared for the respondent Brandt & Brandt Printers, Inc., and hearings having been held before the said Referee on June 30, July 1, July 8 and July 9, 1954 and the Court having rendered its decision on the minutes after the close of the evidence, in which decision the Court finds that the bankrupt and the said Brandt & Brandt Printers, Inc. were engaged as co-partners in conducting the business of

Order of Referee After Trial, Dated July 15, 1954

Faultless Press, it is, on motion of Bergerman & Hourwich, attorneys for the Trustee,

ORDERED, that the chattel mortgage executed by the bankrupt in favor of Brandt & Brandt Printers, Inc. dated February 11, 1952 is void as against the Trustee; and it is further

ORDERED, that Brandt & Brandt Printers, Inc. may not prove a claim as a creditor in this proceeding, except a claim that is subordinate to the claims of creditors who are not partners of the bankrupt; and it is further

ORDERED, that all property and the proceeds of property which came into the possession of the Receiver or Trustee is subject to disposition in this proceeding; and it is further

ORDERED, that in the property listed in Schedule "A" of the answer of Brandt & Brandt Printers, Inc. is the joint property of the Trustee and Brandt & Brandt Printers, Inc., and that the Trustee is entitled to possession thereof, and the Court reserves jurisdiction to determine the manner in which such property shall be applied in satisfaction of claims of such parties as may be entitled thereto.

s/ IRWIN KURTZ
Referee in Bankruptcy

Opinion and Order of District Court on First Petition to Review

September 20, 1954

The order of the referee is confirmed and adopted. His determination that Brandt was a partner of the bankrupt and may not prove a claim as a creditor is well founded in fact and law.

/s/ David N. Edelstein
United States District Judge

First Opinion of United States Court of Appeals for the Second Circuit

(220 F. 2d 935)

BRANDT & BRANDT PRINTERS, INC., Appellant,

v.

DAVID CHARLES KLEIN, Trustee in Bankruptcy of William Friedman, doing business under the name and style of Faultless Press, Appellee.

No. 185, Docket 23386.

United States Court of Appeals,
Second Circuit.

Argued Jan. 12, 1955.

Decided Feb. 14, 1955.

As Modified on Denial of Rehearing May 11, 1955.

On an involuntary petition, filed March 23, 1954, directed against "William Friedman doing business under the name and style of Faultless Press," Friedman was adjudicated a bankrupt. He was doing business in New York. On March 24, 1954, appellee was appointed receiver. (He is now trustee.) On May 10, 1954, he filed a petition for authority to sell, free and clear of all liens and claims, machinery and equipment which had been in the bankrupt's possession at the time of the filing of the bankruptcy petition and had come into appellee's possession. The petition alleged that appellant claimed "ownership of practically all the assets of the bankrupt," and in particular that appellant claimed that it had a chattel

mortgage on certain machinery and equipment and ownership, through a lease, of other machinery and equipment; the petition further alleged that all the assets had been used in a joint venture or partnership in which the bankrupt and appellant were partners. Appellant filed an answer asserting its rights under the chattel mortgage and lease, alleging that the bankruptcy court had "no jurisdiction over the administration" of any of the "property alleged to be joint property" of the bankrupt and appellant, and denying the existence of a partnership.

After a hearing, the referee found that, because of sharing in profits and other facts, appellee was, as a matter of "law," a partner of the bankrupt; that the bankrupt's estate had a joint interest with appellant in all property which had come into appellee's possession, and that the chattel mortgage was void, as the property covered by it was legally a capital contribution by appellant to the partnership. He held, accordingly, that appellant's claims against the bankrupt must be subordinated to the claims of all other creditors' liens. He ordered a sale of certain of the assets free and clear of all liens. (Ultimately, all the assets were converted into cash; to this appellant consented, but without prejudice to its claim.) The district court confirmed and adopted the referee's order. Appellant has appealed.

Gronich, Herbsman & Aleyner, New York City (Sydney Basil Levy, Robert I. Ruback and Jack Altes, New York City, of counsel), for appellant.

First Opinion of United States Court of Appeals for the Second Circuit

Bergerman & Hourwich, New York City (Joseph Calderon, New York City, of counsel), for appellee.

Before CLARK, Chief Judge, and FRANK and HINCKS, Circuit Judges.

FRANK, Circuit Judge.

1. We think the evidence amply supports the Referee's findings and his legal conclusion that a partnership existed.

2. Appellant, however, contends that, if there was a partnership, then the bankruptcy court had no power, without appellant's consent, to administer the partnership assets. We agree. Section 5, subs. a and i of the Bankruptcy Act, 11 U. S. C. A. § 23, subs. a, i, so far as pertinent, read as follows:

> "a. A partnership * * * may be adjudged a bankrupt either separately or jointly with one or more or all of its general partners.
>
> "i. * * * In the event of one or more but not all of the general partners being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."

In other words, the bankruptcy of one partner works a dissolution of the firm, and the solvent

partner (here appellant) must promptly wind it up.[1] As this is a New York partnership, under New York Partnership Law, Section 71, McK. Consol. Laws, c. 39, the assets must be applied by appellant to liabilities in the following order of priorities.

> "I. Those owing to creditors other than partners,
>
> "II. Those owing to partners other than for capital and profits,
>
> "III. Those owing to partners in respect of capital,
>
> "IV. Those owing to partners in respect of profits."

Here the partnership was not adjudged a bankrupt. We reject appellee's contention that the petition in bankruptcy, which named "William Friedman doing business under the name and style of Faultless Press," constituted a petition against the partnership or that the adjudication, also thus naming the bankrupt, adjudicated the partnership. Nor has appellant overtly or impliedly consented to the administration in bankruptcy of the partnership property.[2]

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[1] See 1 Collier, Bankruptcy (14th Ed.) 741; New York Partnership Law, Section 62, clause 5.

[2] Appellee, in his brief, argues that Brandt consented to the bankruptcy court's administration of the partnership assets, because, in March 1954, appellant turned over to appellee the balance in a bank account, identified as "Brandt Special Account." This turnover, however, occurred several months before the Trustee in the bankruptcy proceedings sought to hold Brandt as a partner.

It follows that the bankruptcy court cannot properly administer those partnership assets. See *Marnet Oil & Gas Co.* v. *Staley*, 5 Cir., 218 F. 45, 48-49. This is not a case "where the original proceeding was against a firm, and, upon the discovery of a partner not originally named or known, he was brought in as one of the members of the firm"; *In re Kaufman*, 2 Cir., 176 F. 93, 94. A new or amended petition in bankruptcy, naming appellant as partner, to be followed by its adjudication, would be necessary if bankruptcy jurisdiction of the partnership assets were to be maintained; in that event, appellant would have an opportunity "to controvert the facts alleged in the petition," and a right to a trial "on the question of * * * any act of bankruptcy alleged to have been committed"; *In re Kaufman, supra.*[3] See also *In re Fuller*, 2 Cir., 9 F. 2d 557; 1 Collier, Bankruptcy (14th Ed.) 740-741; cf. *In re Samuels*, 2 Cir., 215 F. 845; cf. *Benitez* v. *Bank of Nova Scotia*, 1 Cir., 110 F. 2d 169, 172, 173-174. In *Kaufman-Brown Potato Co.* v. *Long*, 9 Cir., 182 F. 2d 594, apparently the objecting partners had not objected to the bankruptcy court's administration of the partnership assets until after they had been sold. But here, as soon as appellee asserted the existence of a partnership, appellant answered alleging lack of jurisdiction of the property and denying the partnership status.[4]

Having regard to the present liberal construction of pleadings, we read appellant's answer to the May

[3] As the objecting partner had appeared generally, the *Kaufman* case cannot be distinguished on the ground that there the assets were not in the possession of the trustee in bankruptcy.

[4] *In re Harris*, D. C. N. D. Ohio, 108 F. 517, is perhaps distinguishable on its facts; if not, we think it wrong.

10th petition as (a) denying the existence of a partnership; and (b) in the alternative, asking that, if it should be found that a partnership existed, appellant surrender possession of the partnership assets so that appellant might "settle the partnership business as expeditiously," as the nature of the business permitted.

We hold, therefore, that the partnership assets (or the cash proceeds of the sale of those assets) must be turned over to appellant which must then settle the partnership business expeditiously and, after paying partnership liabilities, account to appellee for any amount due to Friedman's estate under Section 71 of the New York Partnership Law. The effect of our ruling will necessarily require the bankruptcy court to re-examine all claims on file in the Friedman proceedings, and to order that those which are claims solely against the partnership be subordinated to the claims against the individual partner, Friedman, the bankrupt. 1 Collier, Bankruptcy (14th Ed.) 723 et seq. That court has already decided that appellant's claims are solely against the partnership and its finding to that effect will be affirmed. In all other respects, the order appealed from must be reversed with the case remanded for further proceedings in accordance with this opinion.[5]

Affirmed in part, as above indicated, and in all other respects reversed and remanded.

Reversed and remanded.

---

[5] We need not now consider the question of the rank of appellant's claims against the partnership assets under Section 71 of the New York Partnership Law.

Order of District Court After Remand

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 90132

In the Matter

of

WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Bankrupt.

DAVID CHARLES KLEIN, Trustee in Bankruptcy of WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Petitioner-Appellee,

AGAINST

BRANDT & BRANDT PRINTERS, INC.,

Respondent-Appellant.

The Referee's orders now under review are reversed and this matter is remanded to the Referee to fix the expenses and compensation of the Receiver, the Trustee and their Attorneys and to direct that payment thereof be made out of the $40,002.50 fund, before it is turned over to Brandt & Brandt Printers, Inc., pursuant to the mandate of the Court of Appeals.

It is so ordered.

Dated: September 29, 1955
New York, New York.

/s/ SIDNEY SUGARMAN
United States District Judge

Second Opinion of United States Court of Appeals for the Second Circuit

(232 F. (2d) 151)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 294—October Term, 1955.

(Argued April 5, 1956 Decided April 20, 1956.)

Docket No. 23911

In the Matter of

WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Bankrupt.

BRANDT & BRANDT PRINTERS, INC.,

Appellant,

—v.—

DAVID CHARLES KLEIN, Trustee of the above Bankrupt,

Appellee.

Before:

FRANK, MEDINA and WATERMAN,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Sidney Sugarman, *Judge.*

Second Opinion of United States Court of Appeals for the Second Circuit

Brandt & Brandt Printers, Inc. appeal from an order directing Referee to fix compensation of Receiver and Trustee of William Friedman, Bankrupt, and of their attorneys, and directing payment of same out of all funds in Trustee's hands, including partnership fund, before turning over partnership assets to non-bankrupt partner. REVERSED.

GRONICH, HERBSMAN & ALEYNER, New York City (Sydney Basil Levy, Robert I. Ruback, of counsel), *for appellant.*

BERGERMAN & HOURWICH, New York City (Joseph Calderon, of counsel), *for appellee.*

WATERMAN, *Circuit Judge*:

Sufficient explanatory background facts appear in our opinion in *Brandt & Brandt Printers, Inc.* v. *Klein, Trustee,* 2 Cir., 1955, 220 F. 2d 935, where we held that appellant Brandt was in partnership with the bankrupt and that assets of the partnership held by the trustee in bankruptcy "must be turned over to appellant which must then settle the partnership business expeditiously and, after paying partnership liabilities, account to appellee for any amount due to Friedman's [the bankrupt's] estate under Section 71 of the New York Partnership Law." We then remanded the cause for disposition below consistent with this opinion.

After remand the appellant moved the referee for an order directing the trustee to so turn over the partnership assets to it. The trustee answered alleg-

ing that receivers, trustee, and their counsel had rendered services which had been of benefit to the estate and its creditors, and the partnership assets should be subjected to charges for those services. The trustee also presented an order to the referee to fix compensation for these alleged services. The referee granted appellant's motion and issued his order thereon. He denied the trustee's petition because he held the proposed order to be in direct contravention of our above finding. The trustee filed a petition to review both of these acts of the referee.

The District Judge reversed the referee and remanded the cause to him to fix the expenses and compensation of the receiver, the trustee, and their attorneys, and pay the same out of the funds in the trustee's hands before turning over to appellants the partnership assets pursuant to our former mandate.

We reverse the District Judge.

The assets of Brandt & Brandt Printers, Inc. and William Friedman, the co-partnership, are not part of the bankrupt estate of Friedman and cannot be administered in the present bankruptcy proceedings. *Brandt & Brandt Printers, Inc.* v. *Klein, supra.* Likewise, they cannot be charged with compensation of the receiver, the trustee, or their attorneys.

As we stated in *Guerin* v. *Weil, Gotschal & Manges,* 2 Cir., 1952, 205 F. 2d 302, 304:

> It is well settled that the bankruptcy court lacks power to grant, and the policy of the Act is against, compensation not expressly provided for by the Act. *Lane* v. *Haytian Corp.,* 2 Cir., 117 F. 2d 216, 219, certiorari denied 313 U. S.

580, 76 S. Ct. 1101, 85 L. Ed. 1537. Although it has been broadly stated that a bankruptcy court is a court of equity, *Young* v. *Higbee Co.*, 324 U. S. 204, 214, 65 S. Ct. 594, 89 L. Ed. 890, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act. See *Berry* v. *Root*, 5 Cir., 148 F. 2d, 945, 946, certiorari denied 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453. Where Congress intended that allowances should be made it has carefully enumerated them, and any omissions must be construed as express exclusions. Collier, Bankruptcy 1534-7 (14th Ed.).

The fees and allowances of trustees and receivers in bankruptcy, including fees and allowances for their counsel, are allowable only as authorized by the Bankruptcy Act. Section 64 of the Bankruptcy Act, 11 U. S. C. A. §104, provides for the payment of this compensation "out of bankrupt estates." A bankrupt estate consists only of funds and assets left after the determination of all third-party claims. Since we adhere to our former decision that this partnership fund may not be properly administered in bankruptcy, we find nothing in the Act to justify charging these partnership assets with the payment of the compensation here prayed for.

Reversed and remanded for disposition in accordance with this opinion.

JUL 23 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 207.

DAVID CHARLES KLEIN, trustee in Bankruptcy of WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Petitioner,

AGAINST

BRANDT & BRANDT PRINTERS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

DAVID CHARLES KLEIN, trustee in Bankruptcy of WILLIAM FRIEDMAN doing business under the name and style of FAULTLESS PRESS,

Petitioner,

AGAINST

BRANDT & BRANDT PRINTERS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Does a court of bankruptcy have the power to charge the assets of a non-bankrupt partnership, which assets it has no power to administer, with the compensation of the receiver, the trustee, and their attorneys of the estate of an individual bankrupt member of said partnership?

The above question represents the issue presented to the Court below on the last appeal and was the subject of its decision reported in 232 F. 2d 151 (Appx. p. 20).

The petition for writ of certiorari is directed to two separate decrees of the Court of Appeals. The first was dated

and entered on February 14, 1955 and the petition for rehearing was denied on May 11, 1955. No review on writ of certiorari was sought therefrom within the time prescribed by 28 U. S. C. A. Sec. 2101 (c). The issues determined by the Court of Appeals on this first appeal was the subject of its opinion in 220 F. 2d 935 (Pet. App. 13). The Court there held that the lower court's finding of the existence of a partnership between the bankrupt and the respondent was correct, but that since the partnership had not been adjudged a bankrupt and the respondent had not consented to the administration in bankruptcy of the partnership property, the partnership assets must be turned over to the respondent for administration under the New York Partnership Law. The remand was solely for the purpose of re-examination by the bankruptcy court of the claims filed in the bankruptcy proceedings so that an order might be entered subordinating those claims solely against the partnership to the claims against the individual partner (Pet. App. 18).

The Court below thus finally and conclusively disposed of all the issues between the parties leaving nothing more than an act extraneous to the issues involved.

The decree ascertained and declared the rights embracing the substantial merits of the controversy and the issues litigated or necessarily involved in the litigation.

Summary of Argument

The equitable powers of a Court of Bankruptcy do not authorize the allowance of compensation not expressly provided for in the Bankruptcy Act.

The Order of the Court below on the first appeal relative to the lack of jurisdiction of the Bankruptcy Act to administer the partnership property, assuming arguendo

the same is properly before this Court, is in accord with the decisions of other Courts of Appeals.

The decisions of the Court below are not in conflict with those of other Courts of Appeals, present no important question of Federal Law, and are not of public interest and importance.

POINT I

A bankruptcy court lacks power to grant compensation not expressly provided for by the Bankruptcy Act.

A bankruptcy court has only such jurisdiction as is conferred upon it by the statute. *New Lamp Chimney Co.* v. *Ansonia B. C. Co.*, 91 U. S. 656, 23 L. Ed. 336. *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. *Matter of Hollins*, 2 Cir., 229 Fed. 349, cert. den. 241 U. S. 661, 36 S. Ct. 448, 60 L. Ed. 1226. *Silberberg* v. *Ray Chain Stores, Inc.*, 3 Cir., 58 F. 2d 766, cert. den. *Winne* v. *Silberberg*, 287 U. S. 631, 53 S. Ct. 83, 77 L. Ed. 547. *Wheeling Structural Steel Co.* v. *Moss*, 4 Cir., 62 F. 2d 37; *Naylor* v. *Canley*, 8 Cir., 96 F. 2d 761; *Moore* v. *Scott*, 9 Cir., 55 F. 2d 863. Although jurisdiction in bankruptcy is conferred on the district court, the latter when sitting as a Court of Bankruptcy is regarded as a separate court exercising powers and a jurisdiction distinct from its powers as a district court. *Hanna* v. *Brietson Mfg. Co.*, 8 Cir., 61 F. 2d 139. *Norris' Case* (D. C. Mich.) 18 Fed. Cas. 317, Fed. Cas. No. 10304.

It is unquestioned that bankruptcy courts have equity powers, but it is settled that the equitable powers may be exercised only within the limits of the Bankruptcy Act and subject to and consistent with the specific provisions contained therein. *Securities & Exchange Commission* v.

United States Realty & Improvement Co., 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293, *Young* v. *Higbee Co.*, 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890; *Matter of Columbia Ribbon Co.*, 3 Cir. 117 F. 2d 999, *Wheeling Valley Coal Corp* v. *Mead*, 4 Cir. 171 F. 2d 916; *Burton Coal Co.* v. *Franklin Coal Co.*, 8 Cir., 67 F. 2d 796. In *Matter of Judith Gap Commercial Co.*, 9 Cir., 5 F. 2d 307, 309, the Court held that though bankruptcy proceedings are equitable in their nature "nevertheless they are to be administered in accord with the Bankruptcy Act and general orders, and not by virtue of any broad unlimited equity power".

Compensation for services rendered is but one of many phases of bankruptcy proceedings expressly governed by the Act.

Trustees and receivers in bankruptcy, as well as referees, are public officers and their fees and allowances are allowable only within the limits of the Bankruptcy Act. They "must show clear warrant of law before compensation will be owing to them in the performance of their public duties". *Realty Associates Securities Corp.* v. *O'Connor*, 295 U. S. 295, 55 S. Ct. 663, 666, 79 L. Ed. 1446; *Callaghan* v. *Reconstruction Finance Corp.*, 297 U. S. 464, 468, 57 S. Ct. 519, 80 L. Ed. 804; *Matter of Prindible*, 3 Cir., 115 F. 2d, 21. The Courts of Appeal have uniformly held that the bankruptcy court lacks power to grant, and the policy of the Act is against compensation not expressly provided for by the Act. *Lane* v. *Haytian Corp.*, 2 Cir., 117 F. 2d 216, cert. den. 313 U. S. 589, 76 S. Ct. 1101, 85 L. Ed. 1537; *Guerin* v. *Weil, Gotschal & Manges*, 2 Cir. 205 F. 2d 302, *Berry* v. *Root*, 5 Cir., 148 F. 2d 945, cert. den. 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453. *In re First Bond & Mortgage Co.*, 5 Cir., 74 F. 2d 930, *Matter of Joslyn*, 7 Cir., 224 F. 2d 223, *Levin* v. *Barker*, 8 Cir., 122 F. 2d 969. In *Berry* v. *Root* (*supra*), 148 F. 2d 945, 946,

the Court after noting that a bankruptcy court often applies equitable principles but "is not strictly a Court of Equity, but a statutory Court created by the Bankruptcy Act, and governed by it", stated:

> "As to that proceeding the Act of 1898 has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees. The original Act and all the amendments and expansions have dealt specifically with the costs and attorney's and other fees to be allowed, and have dealt jealously with them. The fees allowable for services in each kind of bankruptcy proceedings have been provided, expressly or by implication, others are excluded."

The compensation of receivers and trustees is fixed under Sec. 48 (11 U. S. C., Sec. 76) and Sec. 62 (11 U. S. C., Sec. 102) of the Act, and is payable, together with their attorneys' fees, under Sec. 64 (11 U. S. C., Sec. 104) of the Act. *Matter of India Wharf Brewery Inc.*, 2 Cir., 96 F. 2d 710; *In re Lustron Corp.*, 7 Cir., 196 F. 2d 975. *In re McKenna* (D. C., N. Y.), 137 Fed. 611.

Petitioner made no attempt in the court below and cannot here indicate any provision of the Act which authorizes the payment of the compensation sought.

The following cases cited by the petitioner were not bankruptcy proceedings and therefore inapplicable: *New York Dock Co.* v. *S. S. Poznam*, 274 U. S. 117, a proceeding in admiralty to establish a lien on a vessel; *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, an action by a stockholder against a corporation for mismanagement; *Palmer* v. *Texas*, 212 U. S. 118, an action by a stockholder to liquidate a corporation; *Trustees* v. *Greenough*, 105 U. S. 527, a bondholder's action against trustees to preserve

a fund for bondholders as a class; *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, a bank depositor's action to establish her right in a trust fund which permitted other depositors to recover from the fund on the law made in the case.

Warren v. *Palmer*, 310 U. S. 132, and *In re Peer Manor Bldg. Corp.*, 7 Cir., 143 F. 2d 764, cert. den. 323 U. S. 757, cited by petitioner, are in accord with the bankruptcy decisions above noted. In each of these bankruptcy proceedings there was express statutory authority for the compensation allowed. *Warren* v. *Palmer* (*supra*) was a proceeding under former Sec. 77B of the Act (11 U. S. C. A. Sec. 207). The authority for the granting of allowances was Sec. 77 B(c) (9), (11 U. S. C. A. Sec. 207 (c) (9)) which authorized the judge to "allow a reasonable compensation for services rendered" and Sec. 77 B (1) (11 U. S. C. A. Sec. 207 (1)) which authorized the judge to include in an order of dismissal of the proceedings "such terms as the judge may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section, and for the payment of administration expenses and allowances in the proceeding hereunder." The *Peer Manor* case (*supra*) was a proceeding involved under Chapter X of the Bankruptcy Act (U. S. C. Title II, Chap. 10, Sec. 501-676). Sec. 242 (2) (3) (11 U. S. C. Sec. 642(2) (3)) empowered the judge to allow reasonable compensation to parties in interest and their attorneys. Sec. 246 (11 U. S. C. Sec. 646) empowered the judge to allow reasonable compensation "to any persons entitled thereto, as provided in this chapter", upon dismissal of the proceedings or the entry of an order adjudging the debtor a bankrupt.

The policy of the Act to restrict compensation to that specifically authorized is further evidenced by General Orders in Bankruptcy 35 (3) which provides that "The

compensation allowed to receivers or trustees by the Act shall be in full compensation for the services performed by them", and by Section 72 (11 U. S. C. Sec. 112) of the Act which provides that no receiver or trustee "shall in any form or guise receive, nor shall the Court allow him, any other or further compensation for his services as required by this Act than that expressly authorized and permitted in this Act." In *McMillen* v. *U. S. Fidelity & Guaranty Co.*, 8 Cir., 22 F. 2d 155, the Court held that Sec. 72 prohibits any equitable consideration of reasonable compensation on a *quantum meruit* basis, and in *Nisonoff* v. *Irving Trust Co.*, 2 Cir., 68 F. 2d 32, 34, the Court stated that "The terms of the Act are explicit and strictly enforced."

Sec. 64 of The Act (11 U. S. C. Sec. 104) *supra*, expressly made inapplicable to proceedings under Sec. 77 B (*Warren* v. *Palmer*, *supra*) by Sec. 77 B (c) (8) (k) (11 U. S. C. A. Sec. 207 (c) (8) (k)) and to proceedings under Chapter X (*re Peer Manor Bldg. Corp.* (*supra*) by Sec. 102 (11 U. S. C. Sec. 502)), directs the distribution of the moneys belonging to the bankrupt estate. It provides for the order of payment "out of bankrupt estates", and for the payment therefrom of compensation of receivers, trustees and their attorneys. The bankrupt estate consists only of the residue left after the determination of questions of title, liens and other claims asserted by their parties. *City of Richmond* v. *Bird*, 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543. *In re Cramond* (D. C. N. Y.), 145 Fed. 966; *In re Tresslar* (D. C., Ala.), 20 F. 2d 663; *City of Dallas* v. *Ryan*, 5 Cir., 62 F. 2d 959 cert. den. 289 U. S. 342, 53 S. Ct. 602, 77 L. Ed. 1489. Under this section it is the estate of the bankrupt which is liable for the compensation of the receivers and trustees and their attorneys.

The words "estate" and "bankrupt estates" in the Act mean the unencumbered assets generally of a bankrupt

properly administrable in bankruptcy. The Act does not deal with property which forms no part of the bankrupt's assets. *Matter of Quaker City Uniform Company Inc.* (D. C., Pa.) 134 F. Supp. 596. A "bankrupt" is one against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt (Sec. 1 (4)) (11 U. S. C., Sec. 1 (4) of Act). In the instant matter the bankrupt is Friedman and not the partnership.

The partnership assets did not constitute an asset of the individual's bankrupt estate. Two separate entities are involved herein, the partnership, and Friedman, as the individual bankrupt. Each has its own assets and liabilities. In New York, it has been held that in keeping partnership accounts, the partnership is treated as a legal entity, separate and distinct from the several partners. *Jones* v. *Blun*, 145 N. Y. 333, 341; *U. S.* v. *Onassis* (S. D., N. Y.), 133 F. Supp. 327, 331 (footnote 4).

Upon the finding of the Court below that a partnership existed, the partnership property herein was held by the bankrupt only as a trustee. *Meinhard* v. *Salmon*, 249 N. Y. 458; *Hart* v. *Ronan*, 58 N. D. 516, 226 N. W. 620; 14 A. B. R. (N. S.) 431. Property held by a bankrupt in trust does not constitute an asset or part of a bankrupt's estate. *In re Finkelstein*, 2 Cir., 33 F. 2d 278; *In re Heintzelman Const. Co. Inc.* (D. C., N. Y.), 34 F. Supp. 109; *In re Kline* (D. C., Pa.), 7 F. Supp. 850, affd. sub. nom; *United States National Bank* v. *Blauner's Affiliated Stores*, 3 Cir., 75 F. 2d 826.

The fact of possession of partnership property by the receiver-trustee is of no significance. In *Marnet Oil & Gas Co.* v. *Staley* (*supra*), 218 Fed. 45, 49, the Court stated:

> "The jurisdiction of the court as a court of bankruptcy was not enlarged by the act of the bankrupt

in surrendering to the trustee in bankruptcy partnership property, theretofore in the bankrupt's charge as managing partner, which, without the consent of his solvent partner, the plaintiff in this suit, was not subject to be administered in the bankruptcy proceeding."

Under Section 52 of the New York Partnership Law "a partner's interest in the partnership is his share of the profits and surplus", which can be determined only after compliance with Section 71 of said Law (App. P. 16). The only interest that the receiver-trustee of Friedman had in the partnership property was the right to demand and receive Friedman's interest as a partner, if any, in the firm assets after an accounting and payment of partnership debts out of partnership assets. See also *Redman* v. *Witt*, 6 Cir., 9 F. 2d 36; *In re Mercur*, 3 Cir., 122 Fed. 384; *Pearson* v. *Higgins*, *supra*, 49 F. 2d 47; Section 5 (i) Bankruptcy Act (11 U. S. C., Sec. 23 (1)). Factually, this interest does not exist. In his petition annexed to the proposed order to show cause herein submitted to the Referee, the petitioner stated: "As the partnership funds are insufficient to pay partnership debts, there will be no necessity to account to the Trustee for the interest of the bankrupt partner."

The following have been held not to constitute assets of a bankrupt's estate:—property subject to a conditional sales agreement (*Matter of Lake's Laundry, Inc.*, 2 Cir., 79 F. 2d 326, cert. den. 296 U. S. 622, 56 S. Ct. 144, 80 L. Ed. 442); property held by a bankrupt as bailee or agent (*In re Wright-Dana Hardware Co.*, 2 Cir., 211 Fed. 908; *Taylor* v. *Fram*, 2 Cir., 252 Fed. 465); property in possession of a bankrupt on consignment (*Liebowitz* v. *Voiello*, 2 Cir., 107 F. 2d 914); pledged property in the hands of the bankrupt pledgee (*In re Jacob Berry & Co.* (D. C., N. Y.), 146 Fed. 623, aff'd 174 Fed. 409); property which

came into possession of the bankrupt through fraud (*Gillespie* v. *J. C. Piles Co.*, 8 Cir., 178 Fed. 886), and property of a third party pledged as collateral for the payment of a bankrupt's obligations. *In re A. Roth Co. Inc.*, 7 Cir., 118 F. 2d 156; idem. 125 F. 2d 396.

Property which does not constitute a part of the bankrupt's estate must be withdrawn from the bankruptcy proceedings free from the conditions that may be imposed upon general or secured creditors, *American Service Co.* v. *Henderson*, 4 Cir., 120 F. 2d 525, and free from administration expenses to meet which estate assets may not suffice. *Todd* v. *Pettit*, 5 Cir., 108 F. 2d 139.

Where property is taken from an owner thereof without his consent by a receiver under an order reversed on on appeal, the claimant is entitled to a return of the property without charge of any kind against either him or the property. *Beach* v. *Macon Grocery Co.*, 5 Cir., 125 Fed. 513. Commissions are allowable only upon the surplus remaining after the sale in bankruptcy of personal property pledged for the repayment of a loan. *In re Meadows*, 2 Cir., 211 Fed. 948, cert. den. sub. nom. *Hotchkiss* v. *Lynn*, 234 U. S. 763, 34 S. Ct. 997, 58 L. Ed. 1581. Upon the bankruptcy of a stockholder, the commissions of the trustee are calculated on funds which do not include either securities or their proceeds which claimants have successfully reclaimed, nor can any allowance to the attorney for the trustee be made out of such securities or their proceeds. *In re Wilson* (D. C., N. Y.), 252 F. 631; *In re Morris Bros.* (D. C., Ore.), 8 F. 2d 629. *In re Toole and Henry* (D. C., N. Y), 294 Fed. 975. No commissions are payable upon property sold by a receiver but found not to constitute property of the bankrupt estate on the ground that the property of the bankrupt estate on the ground that the property fraudulently came into the possession of the bankrupt. *Gillespie* v. *J. C. Piles & Co.* (*supra*), 178 Fed. 886.

Where mortgaged property is retained for administration for the benefit of general creditors, compensation is payable out of the general estate. *In re Meyers*, 2 Cir., 24 F. 2d 349; *Gugel* v. *New Orleans Bank*, 5 Cir., 239 Fed. 676; *Smith* v. *Township*, 6 Cir., 150 Fed. 257; *In re Chakos*, 7 Cir., 24 F. 2d 482; *In re 4136 Wilcox Bldg. Corp.*, 7 Cir., 109 F. 2d 588. *In re Williams Estate*, 9 Cir., 156 Fed. 934, 939, the Court stated:

> "They are not chargeable with the general costs of the administration of the bankrupt's estate such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney."

In re T. E. Hill Co., 7 Cir., 159 Fed. 73, cited by petitioner, is not in conflict with the decision below. It involved a dismissal of a bankruptcy proceeding. The Seventh Circuit is in accord with other circuits to the effect that non-bankrupt estate property is not chargeable with expenses of compensation for estate services. *In re Chakos* (*supra*), 24 F. 2d 482, *In re 4136 Wilcox Bldg. Corp.* (*supra*), 109 F. 2d 588; *In re A. Roth Co. Inc.*, 118 F. 2d 156; idem. 125 F. 2d 396. *In re Joslyn* (*supra*) 224 F. 2d 223.

The absence of funds in the bankrupt estate to pay the commissions and allowances does not warrant the Court to order payment thereof from property not constituting property of the estate. *In re Fords Warbuck Springs, Inc.* (D. C., Mass.) 7 F. 2d 959; *Todd* v. *Pettit* (*supra*), 108 F. 2d 139; *Gugel* v. *New Orleans Bank* (*supra*), 239 Fed. 676; *In re Harralson* (8 Cir.), 179 Fed. 490; *Smith* v. *Township* (*supra*), 150 Fed. 257; *In re Richardson* (D. C., La.), 44 F. 2d 671. In *Burton Coal* v. *Franklin Coal Co.* (*supra*), 67 F. 2d 796, 797, the court, after noting that the jurisdiction of a bankruptcy court in equity is confined

to the jurisdiction conferred upon it by the provisions of the Bankruptcy Act, stated:

> "The plain mandate of the law cannot be set aside because of considerations, which may appeal to referee or judge as falling within general principles of equity jurisprudence."

One of the contentions of the petitioner is that a bankruptcy court is a court of equity and that under general principles of equity the partnership assets constituted a fund which was equitably chargeable with a lien for the expenses which have created and preserved it, including compensation to counsel. This contention is untenable both under equitable doctrines and under the Bankruptcy Act.

As above discussed, compensation of a receiver-trustee and counsel is strictly governed by the Act and is payable only from the estate of the bankrupt.

Further, the petitioner did not create and preserve the partnership assets. Such assets were always those of the partnership, the existence of which was found by the Court. The receiver-trustee could not act for partnership creditors. He represented only the estate of the individual bankrupt and his individual creditors. There was no finding of expressed or implied consent by the partnership creditors to their representation by petitioner. *Lea v. Paterson Sav. Inst.*, 5 Cir., 142 F. 2d 932. The receiver was appointed under Section 2a (3) of the Bankruptcy Act (11 U. S. C., Sec. 11a (3)) which authorizes the appointment of a receiver "to take charge of the property of bankrupts". In his action to fasten a partner's liability upon respondent, the receiver acted outside the scope of his duties. *In re Marcuse*, 7 Cir., 11 F. 2d 513. The Trustee, vested "with the title of the bankrupt" under Section 70a (11 U. S. C., Sec. 110a, *supra*), was elected under Section

44 of the Act (11 U. S. C. Sec. 75) by "the creditors of the bankrupt", and the first duty of trustees, under Sec. 47 of the Act (11 U. S. C. A. Sec. 75) is to collect and reduce to money "the property of the estates for which they are trustees". It is "all the items of real and personal property belonging to the bankrupt estate" which is the subject of appraisal and sale. Section 70f (Sec. 11 U. S. C., Sec. 110f). The operation of the business of the bankrupt herein by the receiver-trustee was not done by the procurement or with the consent of the partnership. It was presumably in the interests of the general creditors of Friedman, as the individual bankrupt herein.

Apart from the restrictions on the power of the bankrupt court as above discussed, and viewed from the point of equitable doctrines, it is respectfully submitted that the compensation sought is without authority.

The allowance in equity of the expenses of litigation termed costs "as between solicitor and client" are allowable only in exceptional cases and for dominating reasons of justice. It has been held that the discretion to allow same should never be exercised in a case where the interests of the party whose fund is to be charged are antagonistic to the party for whose benefit the suit is prosecuted. *Caine* v. *Payne* (C. C. A., D. C., Col.), 191 F. 2d 482. In *Gillespie* v. *J. C. Piles & Co. (supra)*, 8 Cir., 178 Fed. 886, 892, the Court stated:

> "There is a manifest injustice and inequity in taking out of a fund or property in the custody of a court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its

> custody and pay compensation for the services of an attorney of a trustee or for the services of any other party by means of which the fund or property has been taken or detained from its equitable owner. Hobbs v. McLean, 117 U. S. 567, 581, 6 Sup. Ct. 870, 29 L. Ed. 940."

In equity there can be no compensation allowed on assets not constituting part of the property being administered by the court. *Attorney General* v. *North American Life Ins. Co.*, 89 N. Y. 94, 105; *Cornell* v. *Nichols, Longworthy Co.*, 2 Cir., 201 Fed. 320. Thus, if property of which the receiver takes possession is determined to belong to persons not parties to the action, the receiver is not entitled to reimburse himself from the fund or property in his possession. High, Receivers (4th Ed.) Section 796, *Ephraim* v. *Pacific Bank*, 129 Cal. 589, 592, 62 Pac. 177, *Howe Co.* v. *Jones*, 66 Iowa 156, 23 N. W. 376, *Pittsfield National Bank* v. *Bayne*, 140 N. Y. 321, 329, 330. The general rule in equity, as in bankruptcy as above discussed, is that neither a mortgagee nor the mortgaged property is liable for receivership expenses not sought or acquiesced in by the mortgagee. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 370; *Nicholsen* v. *Western Loan & Bldg. Co.*, 9 Cir., 60 F. 2d 516, cert. den. 288 U. S. 605, 53 S. Ct. 396, 77 L. Ed. 980. In *Seaboard Nat. Bank* v. *Rogers Mill Products Co.*, 2 Cir., 21 F. 2d 414, it was held improper to charge expenses of administration, principally fees for equity receivers and their attorneys, to the fund realized from the sale of mortgaged property.

It is respectfully submitted that it is uniformly held that a court of bankruptcy has no power to direct that compensation be paid to its officers and their attorneys from property not constituting an asset of a bankrupt estate being administered by it.

POINT II

The order of the Court below relative to lack of jurisdiction over partnership property assuming the same is properly before this Court is in accord with established principles of law.

The Court below held that the bankruptcy court had no jurisdiction to administer the partnership property over the objection of the respondent herein.

The involuntary petition in bankruptcy herein was directed solely to "William Friedman doing business under the name and style of Faultless Press, bankrupt". It alleged that said Friedman, while engaged in business, and insolvent, committed acts of bankruptcy. The respondent was not named in said petition. There was no allegation of a partnership, open or secret, and no allegations of the insolvency of a partnership or of any secret or dormant partner. The subpoena issued thereon and the subsequent order of adjudication was addressed solely to said Friedman.

Under Section 5 of the Bankruptcy Act (11 U. S. C. 23), an adjudication of a partner does not result in the adjudication of the partnership. The partnership and its individual partners are separate and distinct entities from one another. A partnership may be adjudged bankrupt, irrespective as to whether its members as individuals are adjudged bankrupt, and any member may be adjudged bankrupt without involving the partnership entity. *In re Ginsberg*, 3 Cir., 219 F. 2d 472; *Lurie* v. *U. S.*, 6 Cir., 20 F. 2d 589. A partnership must petition or be petitioned against an entity, and if the adjudication in bankruptcy follows, the partnership as such is the entity adjudicated. An adjudication of the partnership as an entity, apart

from or in addition to the adjudication of its partners, is indispensable to the jurisdiction and power of the Bankruptcy Court to administer the partnership property *In re Henry L. Meyer*, 2 Cir., 98 Fed. 976; *In re Mercur, supra*, 122 Fed. 384; *In re L. Stein & Co.*, 7 Cir., 127 Fed. 547.

The only manner in which the Bankruptcy Court could acquire jurisdiction over the assets in an involuntary proceedings in bankruptcy is set forth in Section 3, 5 and 59 of the Act (11 U. S. C. Secs. 21, 23, 95).

Qualified creditors of the partnership, alleging acts of bankruptcy, may file an involuntary petition against the partnership or as against the partnership and its individual members. The partnership, or any general partner thereof, could appear and plead to the petition. Bankruptcy Act, Section 18B (11 U. S. C. Sec. 41 B). The allegations of partnership, insolvency, amounts of claims of creditors, and the commission of the alleged acts of bankruptcy may be controverted. Sec. 18 of the Act (11 U. S. C. A. Sec. 41).

In *Liberty National Bank* v. *Bear*, 278 U. S. 215, cited by petitioner herein, this Court rejected the contention that the adjudication of a partnership was in effect an adjudication of the individual members as contrary to the express provisions of Sec. 5 of the Bankruptcy Act, and held that a petition filed against a partnership which did not in terms seek an adjudication that the individual partners were bankrupts as individuals, nor allege that the individuals were insolvent or had committed any acts of bankruptcy, was not in legal effect a petition filed against them individually, and the adjudication of the partnership was not in legal effect an adjudication of the individual partners.

In defending, the partnership or general partner may defeat the involuntary petition upon a showing of solvency.

A partnership is not insolvent unless the total of its assets and the total of the assets of all of its individual members together, are insufficient to pay its debts. *Francis* v. *McNeal*, 228 U. S. 695, 33 S. Ct. 701, 57 L. ed. 1029; *In re Fuller*, 2 Cir., 9 F. 2d 557; *Mason* v. *Mitchell*, 9 Cir., 135 F. 2d 599.

In the instant matter, the effect of the order of the Referee was to subject alleged partnership assets and an alleged secret partner's assets to the jurisdiction of the Court, although there had been no adjudication in bankruptcy of the partnership or of the alleged secret partner. Such practice was not warranted by any provision of the Act.

In *Matter of Kaufman*, 2 Cir., 176 Fed. 93, 94, an involuntary petition in bankruptcy was filed against one Isaac Kaufman. A motion was thereafter made to amend the proceedings to correspond to the facts so that the petition and adjudication should run not only against Isaac Kaufman, individually, but "Isaac Kaufman" a partnership of which the members were Isaac Kaufman and one Lena Kaufman, his wife. Lena Kaufman appeared generally and filed an answer to the motion. The District Judge held that "it is established that they were as a matter of fact partners doing business under the name of Isaac Kaufman" and ordered the title of the proceedings amended to recite the partnership, and Lena Kaufman to turn over all partnership property to the trustee. The Circuit Court in reversing the order stated:

> "Counsel for Lena Kaufman contends that the record does not sustain the finding that she was a partner with her husband, but it is not necessary to go into that branch of the case. For the purposes of this appeal it may be assumed that for some time prior to the filing of the petition in bankruptcy there

was a firm in the district doing business under the name of 'Isaac Kaufman,' the partners in which were Isaac Kaufman and Lena Kaufman. The existence of the firm, however, was not known or even suspected and in consequence the proceeding was instituted not against any partnership but against Isaac Kaufman individually. The difficulty with the order is that, after proceedings against the individual has progressed for a considerable time, much testimony having been taken, it undertakes to establish the pendency pari passi of another proceeding against the firm, which was never begun by filing any petition against it, and to put that second proceeding in the same condition as the first. In our opinion this cannot be done by a mere order; such a procedure would deprive the firm and the partner now sought to be brought in of the opportunity which the statute gives them to controvert the facts alleged in the petition and to have, if they so desire, a trial by jury on the question of insolvency and any act of bankruptcy alleged to have been committed."

In *Matter of E. M. Fuller & Company* (*supra*) 9 F. (2) 557, the Court stated:

"Indeed, we very clearly indicated, though we did not decide, in Re Samuels, 215 F. 845, 132 C. C. A. 187, that a new adjudication of bankruptcy was necessary, when there was a dormant partner. Any other view must treat the original petition as alleging not only that the estates of named partners and the firm assets were insufficient, but that the same was true if one added the estates of whatever unknown and dormant partners might chance to be discovered. That would be plainly an absurdity, and

no such evidence would have been admissible on the trial of such a petition."

See also *Matter of Kramer and Muchnick* (D. C., Pa.) 213 Fed. 138; *In re J. & M. Schwartz* (D. C. N. Y.) 204 Fed. 326; *Carter* v. *Whisler*, 8 Cir., 275 Fed. 743.

The petitioner cites *Kaufman-Brown Potato Co.* v. *Long*, 9 Cir., 182 F. 2d 594. There an involuntary petition in bankruptcy was filed against two partners individually and two partnerships of which they were partners. The individual partners and the two partnerships were adjudicated bankrupts. The Trustee moved for an order adjudging that there was a third partnership comprised of the two individual bankrupts and other persons. An order was entered adjudging the third partnership a bankrupt but the other persons were not individually adjudicated bankrupts. The Court held that the question was whether the lower Court had the power to decree the third persons members of a partnership which had not been theretofore mentioned in the proceedings and to adjudge such partnership a bankrupt. In holding that the order "was beyond the legal power of the Court" (below), the Court held that there was no authorization to be found in the Bankruptcy Act for an involuntary adjudication as a bankrupt except upon the petition of qualified creditors, and that since the acts of bankruptcy charged in the involuntary petition involved insolvency, proof of the partnership insolvency was mandatory. This holding is in accord with that of the Court below in the instant matter.

The petitioner also cites *In re Harris*, 108 Fed. 517. There the Referee held that since there was an adjudication of bankruptcy of the ostensible partner, the partnership in reality was adjudicated bankrupt under the name of the ostensible partner, such latter name appearing to be the firm name under which the secret partnership did

business. The referee therein stated: "There appears to my mind some doubt as to the soundness of this view". The Court below noted that "*In re Harris*, D. C. N. D. Ohio, 108 F. 517, is perhaps distinguishable on its facts; if not we think it is wrong" (Pet. App. 17 footnote 4). Petitioner does not cite any decision of another Court of Appeals on the same matter in conflict with the decision of the Court below.

Under Sec. 5 (1) of the Act (11 U. S. C. Sec. 23), where all of the general partners of a partnership are not adjudged bankrupt, "the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt; but such general partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the general partner or partners adjudged bankrupt."

It is settled that while the Bankruptcy Court has jurisdiction over the interests of the bankrupt partners in the partnership property, the non-bankrupt partner has the right to administer the partnership property elsewhere than in the bankruptcy.

Marnet Oil & Gas Co. v. *Staley*, 5 Cir., 218 Fed. 45; *Benitez* v. *Bank of Nova Scotia*, 1 Cir., 110 F. (2) 169; *In re Henry L. Meyer*, *supra*, 98 Fed. 976; *In re Mercur*, *supra*, 122 Fed. 384; *Redman* v. *Witt*, *supra*, 9 F. (2d) 36; *Pearson* v. *Higgins*, *supra*, 49 F. (2d) 47.

The petitioner does not now question the applicability of the cases cited above but contends that there was a consent. In its answer respondent challenged the jurisdiction of the Court to administer the property, and when consent was given by it to a sale of the property, such consent was "without prejudice to our claim that the court has no jurisdiction over the property" with the Referee's

comment that "the understanding is whatever rights you have are being preserved."

Petitioner contends that only a partner who acknowledges his status as such at the inception of the proceedings is protected under Section 5 of the Act. No authority is cited for such contention and the Act does not so provide. Petitioner further contends that by denying its status as a partner and in claiming property as owner it, by its adverse claims, gave its consent, and that the Act was not intended to and does not apply to one resisting the contention that he is a partner. No authority is cited to sustain such position. In *Francis* v. *McNeal* (*supra*), 228 U. S. 695, cited by petitioner, the involuntary petition in bankruptcy and subsequent adjudication were against all the partners and the firm. In *In re Harris* (*supra*), the Referee found consent from the action of the silent partner in "standing by without protest, and even with positive denials of any interest in the fund". In the instant case, the respondent asserted its rights and adverse interest to the property in question without delay.

In *Kaufman-Brown Potato Co.* v. *Long* (*supra*), 182 F. 2d 594, 602 (footnote), the Referee noted the existence of consent. There two grounds were advanced as the basis of consent; the first, as a result of a denial of existence of a partnership, and the second, in joining in the involuntary petition, voting for trustee, and in failing to assert an adverse claim. The Court held that the first was not a consent, but that consent could be inferred from the second. None of the elements of the second ground are present here. In the case at bar the petition of the petitioner is silent as to an allegation of consent or facts from which consent could be inferred. Consent is neither noted in the Referee's decision, nor in the order entered thereon.

Petitioner also contends that since the respondent did not object to the administration of all of the firm property,

and turned over a bank balance in the account of Faultless Press to the Receiver, its consent may be inferred. The bank balance was turned over to the Receiver in March, 1954 (Rec. p. 81) several months before the present motion was instituted. Until the petition below was filed by the Receiver, no attempt was made to administer all of the assets as partnership property, and it cannot be said that respondent consented to such administration when it was unaware of any claim of partnership at the time the bank account was turned over. As noted by the Court below "This turn over, however, occurred several months before the Trustee in the bankruptcy proceedings sought to hold Brandt as a partner" (Pet. App. 16 Footnote 2). As stated by the Court below "nor has appellant overtly or impliedly consented to the administration in bankruptcy of the partnership property" (App. 16).

Kaufman-Brown Potato Co. v. *Long* (*supra*) cites *Tate* v. *Brinser* (D. C. Pa.), 226 Fed. 878. The opinion in the *Tate* case is appropriate herein. The Court in referring to the status of one Brinser who was not adjudicated a bankrupt stated (pp. 883-884):

> "There was no attempt then being made to bring the partnership assets in to such court, and how could it be said that Brinser assented to such when it was not attempted? The referee's decision upon the right of Brinser to vote the claims for the election of a Trustee, and the review of that decision by the court upon the petition of Brinser, in no manner involved the partnership assets. Whether they should be brought in by the solvent partner was neither before the referee nor the court. * * * When these claims were proven and attempted to be voted, Brinser was not confronted with any such action. There was no such action. The moment he was confronted with the action he promptly chal-

lenged the jurisdiction and has persisted in that challenge ever since."

The decision of the Court below relative to the lack of jurisdiction of the Bankruptcy Court over the partnership property was in accord with established principles of law and the decisions of other Courts of Appeal. If the decision is in conflict with the Harris decision (*supra*), decided by a District Judge in another circuit, then, it is respectfully submitted, such conflict is outside the rule which moves this Court to grant a writ on the ground of a conflict of decisions (Rule 19).

POINT III

No special or important reasons exist for certiorari.

The decisions of the Court of Appeals are not in conflict with the decisions of this Court or of the other Courts of Appeals. There are no important questions of federal law presented. The questions presented are not of public interest and general importance. The decisions of the Court below are of limited application due to unusual facts presented.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for writ of certiorari, and the petition should be denied.

Respectfully submitted,

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